

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

KELLY and JOSEPH REITER,

No. 07-11702

Debtor(s).

JOHN G. WARNER,

Plaintiff(s),

v.

A.P. No. 09-1091

JOSEPH REITER,

Defendant(s).

Memorandum on Motion to Dismiss

This adversary proceeding is the latest installment in a litigation feud which stretches back for over a decade and involves both this court and the state courts. While defendant Joseph Reiter's motion to dismiss is now before the court, the court elects to treat it as a motion for summary judgment based on various court records and undisputed facts in an attempt to finally drive a stake through the heart of the monster this litigation has become.

The litigation stretches back to 1999, but the relevant facts arise out of a state court action filed by plaintiff John Warner, who is an attorney, on behalf of one of the litigants in the prior proceedings. The state court found the complaint without merit and dismissed it on January 20, 2006, awarding

1 \$46,845.00 in sanctions against Warner and in favor of debtor and defendant Joseph Reiter. Warner  
2 appealed.

3 In July of 2007, the state appellate court reversed the sanctions order. In August of 2007,  
4 Reiter and a co-defendant petitioned the California Supreme Court for review. On October 10, 2007,  
5 the California Supreme Court granted the petition of the co-defendant, but not Reiter.

6 On December 26, 2007, Reiter and his wife filed a Chapter 7 petition. They listed Warner as a  
7 creditor and he was given full notice of the bankruptcy. Reiter and his wife were discharged on  
8 August 20, 2008.

9 On March 26, 2009, the Reiter bankruptcy was reopened on Warner's application. On August  
10 18, 2009, he filed the instant adversary proceeding. In the complaint Warner seeks revocation of  
11 Reiter's discharge and a determination that his claim for appellate costs are "nondischargeable" as a  
12 postpetition debt.

13 Revocation of the discharge is possible pursuant to § 727(d)(1) of the Bankruptcy Code for  
14 fraud in obtaining it, but the only "fraud" alleged by Warner is that the Reiters did not schedule their  
15 claim against him as an asset. However, when the Reiters filed their bankruptcy petition there was no  
16 asset; the state appellate court had reversed the sanctions award against Warner and the state Supreme  
17 Court had denied review. Moreover, to revoke a discharge for fraud the plaintiff must show that he did  
18 not know of the fraud and could not have discovered it until after entry of the discharge. Since Warner  
19 was scheduled as a creditor and knew about the bankruptcy, he could have easily discovered the  
20 "fraud" before entry of the discharge. A discharge may not be revoked for fraud if the party seeking  
21 revocation could have discovered the fraud before entry of the discharge by the exercise of reasonable  
22 diligence. *Mid-Tech Consulting, Inc., v. Swendra*, 938 F.2d 885, 888 (8<sup>th</sup> Cir. 1991); *In re*  
23 *Guadarrama*, 284 B.R. 463, 477 (C.D.Cal.2002). The mere fact that the bankruptcy was a "no-asset"  
24 case does not in any way excuse Warner from the diligence requirement; the possibility of a dividend  
25 has nothing to do with the debtor's discharge.

26 Warner seeks a declaration from the court that his claim for appellate costs is not subject to

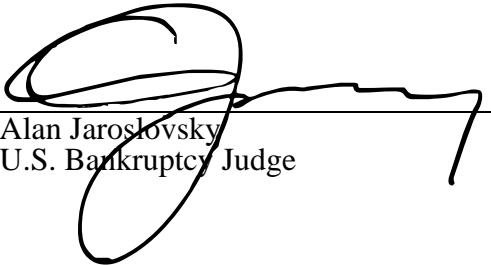
1 Reiter's discharge because it was a postpetition debt. The flaw in this argument is that Warner knew,  
2 on the day the Reiters filed their bankruptcy petition, that he might have a claim against them if he  
3 prevailed in his appeal. Pursuant to § 727(b) of the Code, all dischargeable debts arising before the  
4 filing are discharged. Pursuant to § 101(12), "debt" means liability on a claim. Section 101(5)  
5 provides that a claim is any right to payment, whether or not it is liquidated, contingent or disputed. In  
6 order to facilitate a debtor's fresh start, Congress intended the term "claim" to have the broadest  
7 possible definition, including all legal obligations of the debtor, no matter how remote or contingent.  
8 *In re Parks*, 281 B.R. 899, 901 (Bkrtcy. E.D.Mich 2002).

9 In determining if a debt which matured postpetition is considered to be a contingent prepetition  
10 debt subject to discharge, the court looks to the relationship between the debtor and the creditor and  
11 whether a possible claim was within the fair contemplation of the creditor when the petition was filed.  
12 *In re Jensen*, 995 F.2d 925, 931 (9<sup>th</sup> Cir. 1993); *In re Parks*, supra, at 902-03; *In re Morgan*, 197 B.R.  
13 892 (N.D.Cal.1996), aff'd 131 F.3d 147 (9<sup>th</sup> Cir. 1997). On the day the Reiters filed their bankruptcy,  
14 the parties had a long litigation history between them and Warner knew he had a contingent claim  
15 against them if he prevailed on appeal. Accordingly the appellate costs, even though awarded after  
16 filing, are a prepetition debt subject to the discharge.

17 Warner seeks relief based on the basis of "estoppel" because after filing Reiter unsuccessfully  
18 sought to be included in the appeal. However, there is no equitable basis for revocation of a discharge  
19 of which the court is aware, nor has Warner cited any authority for that proposition.

20 For the foregoing reasons, Warner will take nothing by his complaint, which will be dismissed  
21 with prejudice. An appropriate order will be entered.

22  
23 Dated: December 5, 2009

24  
25   
26 Alan Jaroslovsky  
U.S. Bankruptcy Judge

1 **CERTIFICATE OF MAILING**

2

3

4 I, the undersigned, a regularly appointed deputy clerk of the United States Bankruptcy Court for the  
5 Northern District of California, at Santa Rosa, hereby certify:

6 That I, in the performance of my duties as such clerk, served a copy of the foregoing document by  
7 depositing it in the regular United States mail at Santa Rosa, California on the date shown below, in a  
8 sealed envelope bearing the lawful frank of the Bankruptcy Judge, addressed as listed below.

9 Dated: December 10, 2009

By : Katie Andersen  
Katie Andersen  
Deputy Clerk

10 Joseph Reiter  
11 396 Spring Beauty Court  
12 Windsor, CA 95492

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28